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No. 89-141

In the Supreme Court of the United States

OCTOBER TERM, 1989

LEO M. MULLEN, M.D.,
Petitioner,

vs.

TICOR TITLE INSURANCE CO. of CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

10 pp.

QUESTIONS PRESENTED

Whether the court of appeals acted within its discretion in dismissing, pursuant to its local rule and on its own motion, an appeal from the district court's denial of a motion under Fed. R. Civ. P. 60(b)(6) on the basis of the appeal's being without merit and frivolous where the arguments presented in support of the appeal already had been rejected by the appellate court when it affirmed the district court's original judgment.

PARTIES TO PROCEEDING BELOW

The petition lists parties who were not, to this respondent's best information, parties to the order sought to be reviewed herein. Rather, respondent was the only party to respond to petitioner's motion under Fed. R. Civ. P. 60(b), the denial of which led to the appeal giving rise to that order. The other parties listed in the petition are some, but not all, of the parties named in petitioner's original complaint. The petition fails correctly to state respondent's entire name.

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The respondent, Ticor Title Insurance Co. of California (TTC), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's order in this case entered on April 21, 1989.

JURISDICTION

Petitioner seeks review of an order of the United States Court of Appeals for the Eighth Circuit, dated April 21, 1989. That order dismissed his appeal, as friv-

olous and without merit, from the district court's denial of his motion to set aside judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Petitioner's invocation of this Court's jurisdiction to review the petition's Questions Presented fails because all issues connected with these questions were conclusively determined in respondent's favor by the Eighth Circuit in *Mullen v. Galati*, 843 F.2d 293 (8th Cir. 1988) (per curiam). Petitioner cannot now appeal that order to this Court because he failed to seek review of that order within the time prescribed by statute. Further, the petition fails to invoke this Court's discretionary jurisdiction because the decision of the court of appeals is neither in conflict with the decisions of other courts of appeals on the same matter nor does it concern an important question of federal law that has not been previously settled.

STATEMENT OF CASE

On January 26, 1987, petitioner filed his complaint against two Arizona state judges, Ticor Title Insurance Company of California (TTC), and other individuals, alleging improprieties in real estate transactions in Phoenix, Arizona and in judicial proceedings there concerning those transactions. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Missouri and all defendants being citizens of either Arizona or, in TTC's case, of California.

Upon motion of TTC, supported by affidavits, and after briefs were filed by the parties, the district court on April 1, 1987, entered its order dismissing TTC on the basis of an absence of personal jurisdiction over TTC in Missouri. Petitioner appealed that dismissal. On March 31, 1988, the Eighth Circuit, after considering the briefs of the parties, entered its Order affirming the district court's dismissal. The appellate court further ordered petitioner to show cause why double costs and attorney's fees on appeal should not be entered against him on the basis of the "frivolousness of [the] appeal combined with the improvident, insolent and scandalous language" used by the petitioner in reference to the district court judge, the Honorable Scott O. Wright. *Mullen v. Galati*, 843 F.2d 293, 294 (8th Cir. 1988) (per curiam). After petitioner's response to the show cause order, the appellate court, on May 11, 1988, awarded TTC double costs and its reasonable attorney's fees incurred on appeal.

On July 8, 1988, petitioner filed a petition for writ of certiorari with this Court seeking review of the ap-

pellate court's order. On July 13, 1988, this Court's clerk returned the petition and filing fee to petitioner because the petition failed to comply with this Court's rule 33. Petitioner did not file another petition for writ of certiorari seeking review of the May 11, 1988 order within 90 days of that order nor did petitioner seek any extension of time to do so.

On January 27, 1989, after TTC began to pursue collection of the award of double costs and attorney's fees, petitioner moved the district court to set aside its original judgment under Fed. R. Civ. P. 60(b)(6) and for a change of judge. The district court denied that motion on February 3, 1989. Petitioner appealed that order.

On April 21, 1989 the Eighth Circuit, on its own motion, dismissed the appeal. The appellate court order states in pertinent part:

> This court has already affirmed the judgment of the district court, *see Mullen v. Galati*, 843 F.2d 293 (8th Cir. 1988) (per curiam), and has rejected the very arguments Mullen now raises—that the district court was biased against Mullen. It is clear, therefore, that the instant appeal is entirely without merit and should be dismissed as frivolous. *See* 8th Cir. R. 12(a).

REASONS FOR DENYING THE WRIT

1. Neither the decision appealed from nor the record raise the Questions Presented as asserted by petitioner.

The Questions Presented in the petition (p. 1) concern the alleged "bent mind," bias, prejudice, or other inclination of the district judge, the propriety of TTC's dismissal from this suit on the basis of an absence of personal jurisdiction over it in Missouri, the veracity of affidavits filed in support of that dismissal, and the alleged complicity of attorneys and the district judge in the filing of these affidavits.[1]

The Eighth Circuit, however, in its April 21, 1989 order, did not reach or decide these issues. Moreover, petitioner has already had a full opportunity to have these

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1. Petitioner's second Question Presented (pp. 1-2) states that he "relies heavily on MULLEN VS SULLIVAN et al in the EASTERN DISTRICT of NEW YORK about 1980 in which the HON. JUDGE MARK CONSTANTINO was declared guilty of impermissible judicial conduct and the case used was U.S. VERSUS NAZARRO." Respondent's research has not located either case and respondent is not otherwise aware of what these decisions, if any, hold. Thus, respondent has no idea what these cases involve, other than that the names and matters referenced have no relation to the proceedings in the district or appellate courts herein. To the extent that this alleged finding—of some judge's unspecified "guilt" by some unknown tribunal in a proceeding unrelated to the present one—actually exists, it has no relevance to these proceedings.

In relation to the petition's effort to obtain this Court's review of the substance of the district court's original judgment in this matter or of the Eighth Circuit's 1988 order, respondent notes that the petition includes an affidavit of one Martha M. Craybill. As the acknowledgment to that affidavit indicates, the affidavit did not exist prior to July, 1989 and, thus, was never part of the record before either the district or appellate court. Respondent objects to the inclusion of this affidavit in the petition and moves to strike it.

issues reviewed by the Eighth Circuit and by this Court. As a result of those opportunities, petitioner's Questions Presented have been conclusively decided in respondent's favor.

(1) In its April, 1989 order, the Eighth Circuit dismissed petitioner's appeal under its local rule 12(a) which provides in pertinent part:

> The court, at any time on its own motion and without notice, may summarily dispose of any appeal. . . . The court may dismiss the appeal if . . . it is frivolous and entirely without merit.

Because petitioner's appeal asserted the same issues and arguments that had already been briefed by the parties and ruled upon by the Eighth Circuit in *Mullen v. Galati*, 843 F.2d 293 (8th Cir. 1988) (per curiam), the court, exercising its discretionary authority to control its own docket, dismissed the appeal.

Petitioner does not and could not attack the power of the appellate court to control its docket and to dismiss frivolous appeals. The court's ability to promulgate local rules, such as rule 12(a), designed to govern and regulate practice before it, is sanctioned by statute, rule and precedent. 28 U.S.C. § 2071(a); Fed. R. App. P. 47; *see also Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) ("It cannot be doubted that the courts of appeal have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'").

Moreover, a court's authority to so manage its docket is firmly established in decisional law. *See, e.g., Windsor v. Pan American Airlines, Inc.*, 744 F.2d 1187 (5th Cir. 1984) (sua sponte dismissal of frivolous appeal); *see also United States v. Johnson*, 327 U.S. 106, 111 (1945) (court of appeals "should have decided that [appellant's ground for appeal] does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.").

The Eighth Circuit's dismissal was within its discretion. The arguments advanced by petitioner in support of his rule 60(b)(6)/change of judge motion—the "bent mind" of the district judge, the allegedly false affidavit filed in support of TCC's dismissal for want of personal jurisdiction, and the complicity of attorneys and the district court in filing that affidavit—were the same arguments he pursued in the appeal decided by the Eighth Circuit in 1988. The court acted entirely within its discretion when it dismissed this redundant appeal as frivolous and without merit. *See, e.g., Merit Insurance Co. v. Leatherby Insurance Co.*, 737 F.2d 580 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984) (appeal of district court's denial of rule 60(b) motion dismissed as frivolous where arguments advanced on appeal were identical to those advanced in previous appeal).

(2) No petition for writ of certiorari was docketed in this Court seeking a review of the Eighth Circuit's March 31, 1988 order. Pursuant to 28 U.S.C. § 2101(c), petitioner had ninety (90) days from the date of that order to file such a petition and, had he sought an extension, could have had that period extended by no more than sixty (60) days. While petitioner sent such a petition for filing to the clerk in July of 1988, that petition was

not accepted by the clerk. *See* Supreme Court Rule 21.2. Thereafter, petitioner neither filed a petition for writ of certiorari which complied with this Court's rules nor sought or obtained any extension of time to do so.

Since petitioner failed to file a petition for writ of certiorari of the Eighth Circuit's March 31, 1988 order within the time required by 28 U.S.C. § 2101(c), this Court does not have jurisdiction to review that decision. *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1922).

Nor does petitioner's motion under rule 60(b), the district court's denial of that motion, or the appellate court's dismissal of his appeal from that denial, somehow revive the issues conclusively determined by the Eighth Circuit's March 31, 1988 order. A motion under rule 60 is not a substitute for an appeal, *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979), and cannot supplant an appeal where the issues raised in the motion could have been appealed through the normal appellate process. *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908 (3d Cir. 1977).

2. Dismissal of petitioner's appeal as frivolous and without merit neither conflicts with other appellate decisions on the same matter nor raises an important question of federal law.

The Eighth Circuit's dismissal of the appeal did not constitute a ruling on petitioner's allegations of judicial bias, affiant perjury, attorney or judicial subornation of perjury, or error in granting TCC's dismissal for want of personal jurisdiction. As demonstrated, these allegations

had already been decided by the Eighth Circuit in 1988. Precisely because the Eighth Circuit had passed on these contentions, it dismissed the appeal, in the exercise of its sound discretion, just as the district court exercised its sound discretion in denying the rule 60(b) motion. *See Schlomann v. Ramsdell,* 720 F.2d 20 (8th Cir. 1983) (motions under rule 60(b) are committed to the district court's discretion). That each ruling was an exercise of the courts' discretionary powers under the particular facts of this litigation evinces the absence, in this petition, of any important question of federal law applicable to other litigants such as to qualify this petition for review.

As these were discretionary rulings based on the unique facts of this case, neither the denial of the 60(b) motion nor the dismissal of the appeal conflict, as petitioner claims (pp. 6-7), with *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962), *Dyotherm Corp. v. Turbo Machine Co.,* 392 F.2d 146 (3d Cir. 1968), *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336 (9th Cir. 1971), *Pond v. Braniff Airways, Inc.,* 453 F.2d 347 (5th Cir. 1972), *Poulis v. State Farm Fire and Cas. Co.,* 747 F.2d 863 (3d Cir. 1984), or *Scarborough v. Eubanks,* 747 F.2d 871 (3d Cir. 1984).

There is no conflict between the cited cases and the instant case for at least two reasons. First, the issue in each of the cited cases concerned the appropriate sanction for counsel's failure to prosecute or violation of court orders. In contrast, the Eighth Circuit's order in the present case was not punitive. Instead, it was based on the appeal's redundant assertion of arguments that had been conclusively decided in a prior appeal. Second, because each of the cited cases involved the district courts' punitive dismissal of a complaint, the reviewing courts

in each case were concerned about precluding the litigant's pursuit of the merits of his or her action as a sanction for counsel's dilatory conduct. In the present case, however, petitioner had a full opportunity to present and pursue his claims against the named defendants to the extent those claims were cognizable, to appeal the dismissal of those claims to the Eighth Circuit, and to appeal that court's ruling affirming dismissal to this Court.

Indeed, far from conflicting with the instant case, the cited cases actually support the Eighth Circuit's power to dismiss the appeal. In each case, the question before the reviewing court involved whether the district court acted within its *discretion* in dismissing the complaint. None of the cited cases questioned the *power* of federal courts to dismiss actions, on their own motion or otherwise, as an exercise of the inherent power of a court to control its own docket. As this Court stated in *Link*:

> The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by *the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.*

Link, 370 U.S. at 630-31 (emphasis added). If the federal courts have the inherent power punitively to dismiss, sua sponte, a complaint not yet adjudicated, then it naturally follows that an appellate court has the same power to dismiss an appeal founded upon claims which have already been fully adjudicated.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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